

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

JENNIFER WHITE, KATHERINE WEST, CHARLOTTE
WELLINS and ANNE REMINGTON,

Plaintiffs,

-against-

HON. ANDREW CUOMO, as Governor of the State of New
York, and the NEW YORK STATE GAMING
COMMISSION,

Defendants.

AFFIRMATION

Index No. 5861-16

CORNELIUS D. MURRAY, ESQ., an attorney at law, hereby affirms under
penalty of perjury as follows:

1. I am a member of the law firm of O'Connell and Aronowitz, attorneys for
Plaintiffs in this action.

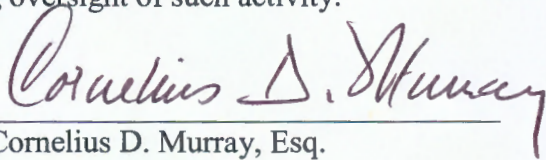
2. This Affirmation is respectfully submitted in support of Plaintiffs'
application for reargument of this Court's Decision, Order and Judgment dated October
26, 2018 and in further support of its application for an Order modifying said Decision,
Order and Judgment to declare that those provisions of Chapter 237 of the Laws of 2016
that purport to exclude interactive fantasy sports (IFS) from the definition of "gambling"
should be declared unconstitutional and that Defendants should be permanently enjoined
from implementing any of the provisions of such law.

3. Attached hereto as Exhibits "A" and "B" are copies of the Memoranda of
Support by the Assembly and Senate sponsors of the legislation that enacted Chapter 237
of the Laws of 2016.

4. Attached hereto as Exhibit "C" is a copy of an article in the *Albany Times Union* referencing the continued activity of IFS by operators purportedly licensed pursuant to Chapter 237.

5. Attached hereto as Exhibit "D" is copy of an article in the *Buffalo News* related to the continuation of IFS activities by FanDuel and DraftKings and the action by New York State Gaming Commission ceasing oversight of such activity.

DATED: November 27, 2018



Cornelius D. Murray, Esq.

Exhibit A

**NEW YORK STATE ASSEMBLY
MEMORANDUM IN SUPPORT OF LEGISLATION
submitted in accordance with Assembly Rule III, Sec 1(f)**

BILL NUMBER: A10736

SPONSOR: Rules (Pretlow)

TITLE OF BILL:

An act to amend the racing, pari-mutuel wagering and breeding law, in relation to the registration and regulation of interactive fantasy sports contests

PURPOSE OR GENERAL IDEA OF BILL:

To provide for the registration, regulation, and taxation of interactive fantasy sports contests in New York State.

SUMMARY OF SPECIFIC PROVISIONS:

Section 1 of the bill would amend the Racing, Pari-Mutuel Wagering and Breeding Law by adding a new Article 14 which would register and regulate interactive fantasy sports contests with an entry fee. Specifically:

Section 1400 provides legislative findings and purpose. Section 1401 provides definitions.

Section 1402 authorizes the registration of interactive fantasy sports operators to conduct interactive fantasy sports contests in New York State. Any operator that was offering contests to New York state residents prior to November 10, 2015 would be able to continue operating until their application for registration has been approved or denied, provided that such operator files an application for registration with the New York State Gaming Commission ("the Commission") within ninety days of the promulgation of regulations to effectuate this article. Such operators would also receive a temporary permit to operate under the required safeguards and minimum standards until their application has been approved or denied. Registrations would remain in effect for three years.

Section 1403 establishes the scope of information required from an interactive fantasy sports operator upon submission of an application for registration to the Commission.

Section 1404 establishes required safeguards and minimum standards in order to provide players with important consumer protections, including:

- *limiting players to one active and continuously used account;
- *prohibiting persons under the age of 18 from participating in any contest;
- *ensuring that accurate representations concerning the chances of winning, and the number of winners, are depicted in all advertisements;
- *ensuring that, unless otherwise approved by the Commission, online

fantasy or simulation sports games or contests with an entry fee are not being directly or indirectly promoted or advertised during the conduct of any online fantasy or simulation sports games or contests without an entry fee;

- *enabling players to exclude themselves from contests and permanently close their accounts at any time;
- *offering introductory procedures for players, and identifying highly experienced players;

- *disclosing the number of entries a player may submit to each contest, and the number of total entries allowed for each contest;
- *measures to protect the privacy and online security of players and their accounts;
- *ensuring players' funds are protected upon deposit and segregated from the operating funds of the operator or registrant; and
- *information concerning assistance for compulsive play in New York State.

This section would also limit the number of entries that can be submitted by a player to any contest, prohibit any contest based on a collegiate or high school sport or athletic event, prohibit any contest based on a horse racing event, prohibit the use of third-party scripts or scripting programs, and ensure that advertisements for contests and prizes do not target prohibited participants, minors, or self-excluded persons.

Section 1405 authorizes the Commission to promulgate regulations to implement the provisions of this article. This section also assigns the Commission with all powers necessary and proper to fully and effectively execute this article, including the ability to accept and investigate complaints from players and investigate alleged violations of this article.

Section 1406 requires each registrant to submit an annual report to the Commission no later than June 30 of each year. The Commission would be authorized to conduct a financial audit of any registrant, at any time, to ensure compliance with this article. The Commission would also be required to publish a report based on the aggregate information provided by all registrants' reports, which would be published on the Commission's website.

Section 1407 imposes a 15% State tax on each registrant's interactive fantasy sports gross revenue for the privilege of conducting interactive fantasy sports contests in New York State, as well as an additional 0.5% tax that is not to exceed \$50,000 annually.

Section 1408 allows the Commission to assess the actual costs necessary to regulate registrants pursuant to this article.

Section 1409 requires the Commission to direct all taxes, interest, and penalties collected to the State Lottery Fund for education.

Section 1410 authorizes the Commission to perform audits of the books and records of operators with permits and registrants, for the purpose of determining the sufficiency of tax payments.

Section 1411 provides authorization for interactive fantasy sports contests registered and conducted pursuant to this chapter.

Section 1412 prohibits the conduct of unregistered interactive fantasy sports contests.

Section 2 of the bill would give the Commission the authority and responsibility of registering and regulating interactive fantasy sports in New York State.

Section 3 of the bill would establish an immediate effective date.

JUSTIFICATION:

On October 6, 2015, the New York State Attorney General's office launched an investigation into whether employees of the two biggest daily fantasy sports companies, DraftKings and FanDuel, were able to gain an unfair financial advantage in daily fantasy football contests by exploiting access to non-public data. On November 10, the Attorney General's office issued a notice to DraftKings and FanDuel demanding that they stop accepting wagers in New York. After months of additional litigation, DraftKings and FanDuel reached an agreement with the Attorney General to stop taking bets from New York customers on March 21, 2016. The agreements outlined the process the companies and the Attorney General would follow in the event that the State Legislature does or does not take action to legalize and regulate daily fantasy sports contests, as well as establish a statutory framework to protect consumers, on or before June 30, 2016.

Bearing in mind that "paid" interactive fantasy sports contests have the potential to produce unfair advantages for certain players, target minors, and increase compulsive play, this bill seeks to regulate all interactive fantasy sports contests with an entry fee, including daily and season-long.

This bill offers important consumer protections to ensure that all contests are safe and fair. Requirements such as limiting players to one active and continuously used account, offering introductory procedures for players, identifying highly experienced players, and depicting accurate representations concerning the chances of winning in all advertisements will help to provide transparency and fairness across all platforms. Measures to protect the privacy and online security of players and their accounts, and requiring registrants to protect players' funds upon deposit, as well as segregate such funds from the companies' operating funds, would provide players with important safety and security protections online.

In addition, requirements would be in place to ensure that players can exclude themselves from contests and permanently close their accounts at any time if they feel that they are becoming compulsive players. For this reason, registrants will also be required to provide information on their websites concerning assistance for compulsive play in New York State. Because of the risks associated with compulsive play, no person under the age of 18 would be permitted to participate in an interactive fantasy sports contest.

By taxing interactive fantasy sports contests, and directing such funds to the State Lottery Fund, this bill will also bring about a new and abundant source of revenue for education in New York State.

LEGISLATIVE HISTORY:

This is new legislation.

FISCAL IMPLICATION:

To be determined.

EFFECTIVE DATE:

This act would take effect immediately.

Exhibit B

**NEW YORK STATE SENATE
INTRODUCER'S MEMORANDUM IN SUPPORT
submitted in accordance with Senate Rule VI. Sec 1**

BILL NUMBER: S8153

SPONSOR: BONACIC

TITLE OF BILL: An act to amend the racing, pari-mutuel wagering and breeding law, in relation to the registration and regulation of interactive fantasy sports contests

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- *ensuring that, unless otherwise approved by the Commission, online fantasy or simulation sports games or contests with an entry fee are not

being directly or indirectly promoted or advertised during the conduct of any online fantasy or simulation sports games or contests without an entry fee;

- *enabling players to exclude themselves from contests and permanently close their accounts at any time;
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- *ensuring players' funds are protected upon deposit and segregated from the operating funds of the operator or registrant; and
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Section 1409 requires the Commission to direct all taxes, interest, and penalties collected to the State Lottery Fund for education.

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By taxing interactive fantasy sports contests, and directing such funds to the State Lottery Fund, this bill will also bring about a new and abundant source of revenue for education in New York State.

LEGISLATIVE HISTORY:

This is new legislation.

FISCAL IMPLICATION:

To be determined.

EFFECTIVE DATE:

This act would take effect immediately.

Exhibit C

NewsRoom

11/20/18 Times Union (Alb.) A3
2018 WLNR 35968867

Albany Times Union (NY)
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November 20, 2018

Section: Main

ONLINE GAMES IN LEGAL LIMBO, STILL RUNNING

DAVID LOMBARDO

Albany

More than three weeks after a court determined that companies like FanDuel and DraftKings were violating the state constitution, they're continuing to operate in New York without immediate fear of repercussion from state regulators.

The state Gaming Commission was hobbled by an Oct. 26 ruling that struck down a 2-year-old state law allowing interactive fantasy sports, in which customers wager on the performance of professional athletes.

Baruch College law professor Marc Edelman interpreted the ruling to mean that interactive fantasy sports can continue in New York without an obligation for providers to comply with any state rules, including having a license.

The Legislature approved a regulatory structure in 2016, when there were no state laws governing the contests and a rush of companies trying to access the state's pool of customers. The unregulated market was targeted by then-Attorney General Eric Schneiderman in 2015, and a legal battle was averted with the passage of the new law.

In the recent ruling, acting state Supreme Court Justice Gerard Connolly found that the online hobby violated the strict prohibition on gambling in New York's Constitution because the contests involve a significant element of chance. And while the judge determined the state Legislature was well within its rights to decriminalize the industry, he found it didn't have the authority to grant the Gaming Commission oversight.

"We're in a little bit of a foggy, hazy, legal no-man's land," said Cornelius Murray, the attorney who brought the challenge to the law.

If the state files a notice of appeal, which Murray expects, the ruling would be stayed pending the resolution of the appeal. Gaming Commission spokesman Brad Maione said it is consulting with the state attorney general's office on whether to challenge the ruling.

Until a notice is filed, though, Maione acknowledges the commission "no longer has a role in regulating" interactive fantasy sports and isn't involved in collecting tax revenues.

Interactive fantasy sports companies generated about \$4.9 million in state tax revenue in 2017, according to a state report. If the state is unable to collect the revenues, New York would be missing out on about \$93,560 a week based on last year's report.

One sign that the commission is taking a hands-off approach came immediately after the ruling when references to interactive fantasy sports were stripped from its website. Maione confirmed that the ruling "required a modification of the website."

Despite the pending legal questions, FanDuel and DraftKings, the two biggest players in the industry, aren't hitting pause on their operations.

In a statement, DraftKings outside counsel David Boies maintained that the court's ruling found their product isn't gambling under state law, but he didn't address its constitutionality.

"We are continuing to study the court's decision invalidating the regulatory structure and are committed to working with the Legislature," he said.

FanDuel added that the company believes in the "benefits of regulation and will cooperate with efforts to permanently restore regulatory oversight."

Even before the court ruling the state's regulatory approach was still a work in progress. The Gaming Commission was operating on temporary permits granted to companies that entered before the state law was adopted. Edelman said the ruling allows new companies to enter the market and ends the shared monopoly that the limited number of operators in the state previously enjoyed.

The soonest the state constitution could be amended to comply with the judge's decision is 2021.

David.Lombardo@timesunion.com - 518-454-5427 - @poozer87

--- Index References ---

Company: EDELMAN INC; FANDUEL INC

News Subject: (Judicial Cases & Rulings (1JU36); Legal (1LE33); Regulatory Affairs (1RE51); Sports Law (1SP70))

Industry: (E-Commerce (1EC30); Entertainment (1EN08); Internet (1IN27); Internet Regulatory (1IN49); Online Gambling (1ON09); Retail (1RE82); Sports (1SP75))

Region: (Americas (1AM92); New York (1NE72); North America (1NO39); U.S. Mid-Atlantic Region (1MI18); USA (1US73))

Language: EN

Other Indexing: (DraftKings) (Cornelius Murray; Marc Edelman; David Boies; Brad Maione; Eric Schneiderman; Gerard Connolly)

Keywords: STATE; INTERACTIVE; RULING; COMMISSION; FANTASY; LAW; SPORTS; COMPANIES; COURTKeywords:

Edition: Final Edition

Exhibit D

NewsRoom

11/20/18 Buff. News 5
2018 WLNR 35942007

Buffalo News (NY)
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November 20, 2018

Section: Local News

Daily fantasy sports betting operating unsupervised

By Tom Precious

News Albany Bureau Chief

ALBANY – New York State has become the Wild West for the daily fantasy sports wagering industry.

A month after the contests were declared illegal by a state judge, an odd legal twist has emerged: The state agency responsible for overseeing the industry has quietly stopped any regulatory authority over more than a dozen daily fantasy sports companies that continue offering the wagering opportunities for what they claim are millions of New York customers.

The contests will remain unregulated – in the midst of heavy betting periods with three pro sports leagues' seasons underway – until the state moves ahead with an expected appeal of the recent ruling by acting state Supreme Court Justice Gerald W. Connolly.

That could be until early December.

The state cannot also impose special taxes on the daily fantasy sports industry during this period.

The situation was noticed when the state Gaming Commission dropped any reference on its website to the daily fantasy sports industry.

The agency had publicly reported financial information about the operations of the businesses in New York, temporary regulations intended to provide consumer protections, and a list of daily fantasy sports companies licensed to do business in the state.

"Since the notice of entry was filed, the Commission no longer has a role in regulating DFS.

That required a modification of the website," said Gaming Commission spokesman Brad Maione.

It was not immediately clear how, or even if, the daily fantasy sports operators have changed any of their contests offerings or player rules in light of the new regulatory-free environment.

In his ruling, the state judge gave a victory to a lawsuit's anti-gambling plaintiffs by declaring daily fantasy sports contests to be an illegal form of gambling in New York. It would require a change in the constitution to make DFS legal, not just an act of the Legislature and approval by Gov. Andrew M. Cuomo that paved the way for daily fantasy sports contests in 2016.

However, in a victory for the state and industry, the judge let stand the 2016 law that dropped any criminal penalties against those conducting daily fantasy sports contests. That permitted daily fantasy sports wagering to continue uninterrupted.

The effect: The state had to stop regulating while the industry got to keep offering its games.

"The decision makes clear that the New York legislature's decision to exclude fantasy contests from the definition of illegal gambling cannot be challenged in court. Accordingly, we will continue to offer fantasy sports to New Yorkers," FanDuel said in a statement Monday.

The company, through a spokeswoman, added: "We also believe in the benefits of regulation and will cooperate with efforts to permanently restore regulatory oversight."

The unregulated environment is likely to expire if and when the state, which believes the contests are legal forms of gambling, appeals the ruling by Connolly.

An appeal would likely result in an automatic stay of Connolly's ruling, thereby permitting the regulatory role for the state to restart while the appeals process works its way eventually to the state Court of Appeals, New York's top court.

The state is facing a deadline for an appeal: Dec. 2, which is 30 days after the judge's ruling was formally filed.

State officials would only say that an appeal is being considered.

Lawyers believe the state could try to bypass a midlevel appeals court and take the case directly to the Court of Appeals.

Cornelius Murray, an Albany lawyer representing the anti-gambling plaintiffs, is considering different routes, including going back to the lower court judge to seek a modification so the contests would be considered both illegal – as in the decision – but also a violation of criminal laws.

"We're in that proverbial no-man's land for the time being. I think the dust will settle, but it's kind of a vague, difficult-to-describe period right now," Murray said Monday.

The daily fantasy sports situation comes as the Cuomo administration also is considering how it might move ahead with permitting broader sports gambling to occur in the wake after a U.S. Supreme Court ruling earlier this year that lifted a federal ban on wagering on pro and college sports contests.

The administration has been considering rules to at least permit the start-up of sports gambling at four commercial casinos, which would then lead to sports wagering at Native American-owned casinos, including the three Seneca Nation gambling halls in Western New York.

insiders believe Cuomo is looking at including some sort of broader sports gambling plan in his 2019 state budget, which he will unveil sometime in January.

Unclear is whether industry efforts to permit online gambling on sports contests will require a change in the state's constitution, which would take several years to complete.

--- Index References ---

News Subject: (Judicial Cases & Rulings (1JU36); Legal (1LE33))

Industry: (E-Commerce (1EC30); Entertainment (1EN08); Gaming Industry (1GA25); Internet (1IN27); Internet Regulatory (1IN49); Online Gambling (1ON09); Retail (1RE82); Sports (1SP75))

Region: (Americas (1AM92); New York (1NE72); North America (1NO39); U.S. Mid-Atlantic Region (1MI18); USA (1US73))

Language: EN

Other Indexing: (Gerald Connolly; Cornelius Murray; Andrew Cuomo; Brad Maione)

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End of Document

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